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Supreme Court of the United States

No. 444, October Term, 1931.

Vera Alexander, administratrix of the Estate of James Alexander, deceased, et al.,

Petitioners,

against

Spencer Kellogg & Sons, Inc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Lucien V. Axtell,
Proctor for Petitioners.

Corporate Press, Inc., New York City

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Supreme Court of the United States

OCTOBER TERM, 1931.

No.

VERA ALEXANDER, administratrix of the Estate of JAMES ALEXANDER, deceased, et al.,

Petitioners,

against

SPENCER KELLOGG & SONS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Vera Alexander, administratrix of the estate of James Alexander, deceased, Nora McEachin, administratrix of the estate of Henry A. McEachin, and thirty other claimants whose names appear at (R., 263-4, 269), respectfully pray for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit in this proceeding in admiralty for limitation of liability wherein such limitation was denied and jurisdiction retained generally but renounced in respect to the petitioners' claims as justiciable only before the New Jersey Workmen's Compensation Bureau.

Origin and Nature of the Case.

The launch Linseed King, a licensed vessel, sank in the Hudson River, on a voyage from New York to New Jersey, thereby occasioning loss of life and personal injuries. The respondent vessel owner instituted a proceeding in admiralty for limitation of liability, citing all claimants to appear therein and restraining all proceedings before any other tribunal. In such limitation proceeding the issues were fully litigated, the vessel owner was denied the right of limitation and a commissioner appointed to assess damages. Evidence was taken before him respecting the facts of death and injury in the individual claims, the facts of relationship and dependency, etc., and awards of damages were made.

On exceptions to the commissioner's report the United States District Court for the Southern District of New York and, on appeal, the Circuit Court of Appeals for the Second Circuit held that such claimants as were employees of the vessel owner or personal representatives of such employees could not recover in the limitation proceeding into which they had been brought *in invitum* and remitted them to the New Jersey Workmen's Compensation Bureau which for more than four years had been restrained from hearing or determining their claims.

The Question Involved.

Should the United States District Court have maintained jurisdiction over claims arising from the deaths of and injuries to the employes of the vessel owner on the ground that—

(a) such deaths and injuries occurred by reason of tort in the navigation of such vessel on waters within the admiralty jurisdiction and/or

(b) that the jurisdiction invoked by the vessel owner to determine the vessel owner's liability under the Act of Congress providing for the limitation of such liability is an independent head of jurisdiction extending to the determination of all claims, maritime or non-maritime, and the furnishing of a complete remedy in respect thereof as this Court held in *Hartford Accident Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207 and/or

(c) that the vessel owner by seeking the limitation offered by the Acts of Congress, i. e., to the value of the vessel after loss, instead of the limitation upon claims offered by the New Jersey Workmen's Compensation Act, i. e., to the scheduled amounts thereunder, repudiated its obligations under the Compensation Act, if originally applicable, and after such repudiation may not compel employes or their personal representatives to resort to the remedies under the Workmen's Compensation Act from which the limitation proceeding had debarred them?

Statement.

1. Your petitioners number both personal representatives of deceased employes and survivors who suffered personal injury as a result of the sinking of the motor vessel "Linseed King" in the Hudson River on December 20th, 1926, while on a voyage from New York City to Edgewater, New Jersey.

2. Respondent, a New York corporation, was the owner of the "Linseed King."

3. The "Linseed King" was used to transport respondent's employes as well as applicants for employment between New York and respondent's factory at Edgewater, New Jersey, and while she was so engaged, the disaster occurred.

4. On March 5th, 1927, the respondent filed in the United States District Court for the Southern District of New York a petition praying limitation of its liability under the Limited Liability Acts of Congress, U. S. C. A. Title 46, Sec. 182-189, in respect of all claims arising out of the disaster (R., 8).

5. At the instance of the respondent, an order issued out of the District Court restraining all courts, including the New Jersey Workmen's Compensation Bureau, from hearing or determining such claims (R., 27). All claimants, including your petitioners, were cited to appear in the limitation proceeding and prosecute their claims in Admiralty (R., 31).

6. Seventy-eight claimants including petitioners presented their claims and made answer to the petition denying respondent's right to a limitation of liability because of its privity to and knowledge of the unseaworthiness which caused the disaster.

7. The case was tried from January 12th to February 1st, 1928, before Hon. John R. Hazel, D. J. On March 15th, 1928, he rendered his decision in writing (R., 122) 24 Fed. (2d) 969, adjudging the respondent liable in full on the ground that the vessel was unseaworthy for navigation in the Hudson River during the winter season; that she was overcrowded, and that the occurrence was with the privity and knowledge of the respondent.

8. On the authority of *Hartford Accident Indemnity Co. v. Southern Pacific Co.*, 273 U. S. 207, Judge Hazel ordered the proceeding continued in admiralty before a Special Commissioner for the purpose of assessing all claimants' damages (R., 139).

9. Hearings before the Special Commissioner on the seventy-eight claims filed began on May 15th, 1928, and ended May 27th, 1930. On July 9th, 1930, the Commissioner filed his report awarding damages. He found that since the deaths occurred on navigable waters within the territorial limits of the State of New York, while on a vessel making a voyage from New York to New Jersey, the general maritime law as supplemented by the New York Death Statute determined the right and measure of recovery, and further, that the nature of a limitation proceeding conferred complete jurisdiction upon the admiralty court to award damages to all the claimants (R., 183).

10. On exceptions to the Commissioner's report Hon. Robert P. Patterson, D. J., ruled that claimants who filed claims in the cases of men who were employees of respondent could not recover in admiralty; that their only remedy was to proceed before the New Jersey Workmen's Compensation Bureau, notwithstanding the fact that the tort was maritime and respondent had required petitioners to appear in admiralty to prove their claims (R., 31), and had restrained the Compensation Bureau for more than four years from hearing or determining such claims. With respect to claimants who were non-employes he however affirmed the Special Commissioner and held the New York Death Statute governed. (Opinion of Judge Patterson, R., 180.)

11. The final decree entered on February 24th, 1931, accordingly dismissed the claims of your petitioners (R., 251). From this ruling petitioners appealed to the United States Circuit Court of Appeals for the Second Circuit (R., 263). Thereafter, respondent also appealed from so much of the final decree as adjudged it liable for the disaster and awarded damages based on the general maritime law as supplemented by the New York Death Statute, to those claimants who were not employees.

12. The appeals were argued before the United States Circuit Court of Appeals on June 9th and 10th, 1931. On July 24th, 1931, that Court rendered a decision affirming the decision and decree of the District Court (R., 2365). The order for mandate was filed July 31st, 1931 (R., 2377).

13. On August 5th, 1931, one of the Judges of the Circuit Court of Appeals entered an order staying the mandate of that court pending the determination by this Court of the petitions for writs of certiorari.

14. The amount involved, i. e., damages awarded petitioners by the Commissioner is approximately $190,000 exclusive of interest (R., 243-245).

Reasons for the Allowance of the Writ.

1. Until the present decision of the Circuit Court of Appeals, the Courts in this and other jurisdictions (*In Re Pennsylvania R. R. Co.*, 48 Fed. (2) 559-564; *In Re Liverpool, Brazil & River Plate Steam Nav. Co.*, 49 Fed. (2d) 947; *Old Ironsides*, 1929 A. M. C. 300) have followed the letter and

clear intent of *Hartford Accident Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, wherein this Court decided:

> "If Congress has constitutional power to gather into the admiralty court all claimants against the vessel and its owner, whether their claims are strictly in admiralty or not, as this court has clearly held, it necessarily follows as incidental to that power that it may furnish a complete remedy for the satisfaction of those claims by distribution of the res and by judgments in personam for deficiencies against the owner, if not released by virtue of the statute" (p. 217).

Despite this clear statement of the law both the District Court and Circuit Court of Appeals treated the *Hartford* case, *supra,* as inapplicable to the claims of petitioners filed herein.

2. The holding of the Circuit Court of Appeals that the New Jersey Workmen's Compensation Act was inapplicable to this case is in conflict with and repugnant to Article III, Sec. 2 of the Constitution extending the judicial power of the United States "to all cases of admiralty or maritime jurisdiction."

3. The case involves the construction of Acts of Congress and presents an important and hitherto undetermined question of conflict between the New Jersey Workmen's Compensation Act and the Limited Liability Acts, U. S. C. A. Title 46, Secs. 182-189.

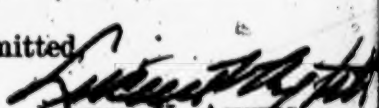
4. The precedent established below introduces great confusion into the law in a matter of general interest and mutilates the symmetry of the admiralty system of rights and remedies as heretofore defined by this Court.

5. Obvious hardships have been visited upon a large number of persons by the course of decision below in first requiring them at great expense and delay to prove their claims in admiralty, restraining them from proving their claims in any other tribunal, and now after a lapse of nearly five years ordering them to begin anew before the New Jersey Compensation Bureau. If, at this late date, the highest court of New Jersey should for any reason hold that petitioners are outside the jurisdiction of the Compensation Act they would be left entirely without remedy. The decision of this Court in the *Hartford* case, 273 U. S. 207, was intended to avoid just such injustice.

6. The jurisdiction of the District Court is involved.

WHEREFORE, your petitioners pray that a writ of certiorari be issued directed to the United States Circuit Court of Appeals for the Second Circuit commanding that court to certify and to send to this Court, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein which was entitled in that court (*In Re Spencer Kellogg & Sons, Inc., Ex Parte Hilda M. Hicks, as administratrix, et al.*) to the end that said case may be reviewed and determined by this Court as provided by law, and that petitioners may have such other and further relief or remedy in the premises as to this Court may seem just and appropriate, and that the said decree of the Circuit Court of Appeals in said case may be reversed by this Honorable Court and a decree rendered for petitioners.

Respectfully submitted,



LUCIEN V. AXTELL,
Proctor for Petitioners.

State of New York,
Southern District of New York, } ss.:
County of New York,

LUCIEN V. AXTELL, being duly sworn, does hereby say that he is one of the proctors for the petitioners herein; that he has read said petition subscribed by him, and that the facts therein stated are true to the best of his knowledge, information and belief; that the petition is well founded and the cause is one in which the prayer of the petitioners should be granted by this Honorable Court.

Lucien V. Axtell

Subscribed and sworn to before
me by Lucien V. Axtell, this
6th day of October, 1931.

Edith McCormick
Notary Public, Kings Co.
Kings Co. Clerk's No. 188, Register's No. 3074.
N. Y. Co. Clerk's No. 245, Register's No. 3 Mc160.
Term expires March 30th, 1933.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1931.

No.

VERA ALEXANDER, administratrix of the Estate of JAMES ALEXANDER, deceased, et al.,

Petitioners,

against

SPENCER KELLOGG & SONS, INC.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

The opinion of Hazel, D. J., is found at R., 123 and is reported 24 F. (2d) 967. The opinion of Patterson, D. J., appears at R., 180 and is reported 48 F. (2d), 311. The opinion of the Circuit Court of Appeals is set forth at R., 2365 and is as yet unreported.

Juriadiction.

The judgment, (order for mandate) of the Circuit Court of Appeals was entered July 31, 1931 (R., 2373). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. at L. 936, c. 229) and under Rule 38 of this Court.

Statement.

A statement of the facts and proceedings will be found in the petition.

Specification of Errors.

Both Courts erred:

1. In failing to hold that under the decision of this Court in *Hartford Accident Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, the Admiralty Court had jurisdiction in a limitation proceeding to give all claimants a complete remedy.

2. In failing to hold that inasmuch as the deaths and injuries occurred on a vessel on navigable waters while on a voyage between the States of New York and New Jersey, the rights and liabilities of the parties arose out of and depended upon the general maritime law and not upon the New Jersey Workmen's Compensation Act.

3. In failing to hold that the New Jersey Workmen's Compensation Act was in direct conflict with the Limited Liability Acts of Congress (*Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 217) and must therefore yield to the Acts of Congress and the general maritime law.

4. In failing to hold that the respondent, by invoking the Limited Liability Acts to the exclusion of the Workmen's Compensation Act (R., 7, 8), had thereby waived, repudiated and lost by laches the right, if any such right existed, to confine petitioners to the compensation remedy, and is estopped from denying petitioners the right to recover in admiralty, the forum to which respondent compelled them to resort.

ARGUMENT.

POINT I.

The bringing of the limitation proceeding by respondent conferred jurisdiction upon the admiralty court to give petitioners a complete remedy in admiralty.

Such was the ruling of this Court in *Hartford Accident Indemnity Co.* v. *Southern Pacific Company*, 273 U. S. 207, wherein it was said:

> "The jurisdiction of the admiralty court attaches in rem and in personam by reason of the custody of the res put by the petitioner into its hands. The court of admiralty, in working out its jurisdiction, acquires the right to marshal all claims, whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the res and by judgment in personam against the owners, so far as the Court may decree" (p. 217).

The jurisdiction which a court of admiralty thus acquires is *exclusive*. The statute itself and the decisions construing the objects to be accomplished thereby make it necessary that upon the filing of the petition for limitation of liability all other actions or proceedings cease.

Sec. 4285 R. S. U. S. C. A., Title 46, Sec. 185;*
Providence & New York S. S. Co. v. *Hill Mfg. Co.*, 109 U. S. 578;
The San Pedro, 223 U. S. 365.

When, therefore, the respondent instituted the proceeding and caused a monition to be issued out of the District Court citing: "all persons claiming damages for any and all loss damages or injuries in connection with said alleged disaster or the voyage on which the Motorboat, 'Linseed King' was then engaged to appear before said Court and make due proof of their respective claims and answer the allegations of the said petition" (R., 30), petitioners had no alternative but to appear in the limitation proceeding and there prove their claims. *Butler* v. *Boston Steamship Co.*, 130 U. S. 527, 552.

After the entire controversy had thus been committed to the Admiralty Court for complete adjudication and the respondent found liable for the disaster after a trial lasting three weeks and the Special Commissioner, to whom the Trial Judge referred the cause, had awarded damages to petitioners after hearings which lasted more than two years,—the decision of the Circuit Court of Appeals that the

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*"Sec. 185. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this chapter relating to his liability for any embezzlement, loss or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease."

Admiralty Court was without jurisdiction to award damages to petitioners was contrary to *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207. In that case this Court held that, even if the claims were not ordinarily cognizable in admiralty, the District Court had power in a limitation proceeding to give claimants a complete remedy, saying:

> "But this limitation of liability proceeding differs from the ordinary admiralty suit, in that, by reason of the statute and the rules, the court of admiralty has power (*Providence Steamship Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578) to do what is exceptional in a court of admiralty—to grant an injunction, and by such injunction bring litigants, who do not have claims which are strictly admiralty claims, into the admiralty court. *Benedict on Admiralty*, 5th ed., Sec. 70, note 97. There necessarily inheres, therefore, in the character of the limitation of liability proceeding, in reference to such non-admiralty claims, the jurisdiction to fulfill the obligation to do equitable justice to such claimants by furnishing them a complete remedy" (p. 218).

See also

The No. 6, 241 Fed. 69 (2nd C. C. A.).

Since the admiralty court assumes jurisdiction over a non-maritime tort in a limitation proceeding and applies the maritime remedy, *a fortiori*, it should do so where the tort is maritime.

The locus having been maritime, the disaster having involved the sinking of a licensed vessel, in midstream of the Hudson River, in the navigable waters of the United States, on an interstate voyage, due to the unseaworthiness of the

vessel, its lack of fitness for navigation when ice was upon the river and its being overcrowded, insufficiently manned and so navigated as to be sunk by reason of collision with floating ice, the case is clearly one of maritime tort, within the admiralty jurisdiction, and to which the maritime law applies.

United States Constitution, Art. 3, Sec. 2;
Atlantic Transport Co. v. *Imbrovek*, 234 U. S. 52;
Leathers v. *Blessing*, 105 U. S. 626, 630.

Where there is no Federal Statute regulating the right of recovery for wrongful death, the maritime law may be supplemented by the death statute of the State within whose navigable waters the tort causing the death was committed. *Western Fuel Co.* v. *Garcia*, 257 U. S. 233. The deaths admittedly occurred in the Hudson River within the jurisdiction of the State of New York, and hence the New York Death Statute governs and affords a cause of action for the deaths so caused, and the District Court should unquestionably have made awards in personam to petitioners based on that statute, just as it did to the claimants in this proceeding who were non-employes. The denial to petitioners of the same remedy was contrary to previous decisions of this court, and particularly to the decision in the *Hartford* case, 273 U. S. 207.

POINT II.

The New Jersey Workmen's Compensation Law is inapplicable and ineffective to oust the maritime law as supplemented by the New York death statute.

The tort occasioning the injuries and deaths was a peculiarly maritime tort; the relationship of the parties at the time was a maritime relationship; the locus was maritime; the wrongs were maritime; the negligence was maritime; such violations as occasioned the disaster were violations of maritime law and of rights and duties under the maritime law; the tort occurred upon a vessel, and was a tort, to which the Limited Liability Acts of Congress apply and the New Jersey Workmen's Compensation Act must yield to the Acts of Congress.

In *Butler* v. *Boston Steamship Co.*, 130 U. S. 527, this Court held that:

> "The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country, and therefore it is co-extensive, in its operation, with the whole territorial domain of that law. * * * As the constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature, and not in the state legislatures * * *" (pp. 555, 557).

The Limited Liability Acts provide for limitation of liability to the vessel and freight, [even though at the bottom of the sea], if the disaster occur without the owner's privity or knowledge, whereas the New Jersey Workmen's Compensa-

tion Act provides arbitrary liability according to arbitrary schedules in the Act, even in the absence of any negligence of the owner or its servants. They are in hopeless conflict, therefore, and both cannot govern the same case. The Limited Liability Acts apply, and are, indeed, in process of enforcement, here. The Compensation Act, therefore, must in any event, give way.

This was recognized and pointed out by Mr. Justice McReynolds in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, at page 218, as follows:

> "The remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction. * * * And finally this remedy is not consistent with the policy of Congress to encourage investments in ships manifested in the Acts of 1851 and 1884 (Rev. Stats. Secs. 4283-4285 * * * which declare a limitation upon the liability of their owners" p. 218).

And in *State* v. *Daggett,* 87 Wash. 253, 259, the court said:

> "It will thus be seen that Section 4283 of the Federal Statutes limits the liability of the owner of a vessel. This limitation of liability becomes the extent of the recovery. Beyond the liability as limited by the statute there can be no recovery. The Workmen's Compensation Act limits the amount for which the employer may become liable as specified in the act. The Congress of the United States having passed a law which limits or measures the extent of the liability of the owner of a vessel to a workman who has sustained an injury, the legislature could not have the power to fix another and different standard or measure" (p. 259).

See also *Flink* v. *Paladini*, 279 U. S. 59.

The fact that the New Jersey Workmen's Compensation Act is "elective" in form does not affect this case. If the tort is of such maritime character that the State has no authority to supplant the applicability thereto of the maritime law by a compulsory workmen's compensation act, this effect cannot be accomplished by a statute which provides that the parties affected shall be deemed to have elected to be subject to the Act unless they indicate the contrary.* If the elective character of the Act does not preclude the petition for limitation it cannot preclude the claim for damages. This is plain from the decision of this court in *Employers' Liability Assn.* v. *Cook*, 281 U. S. 233, 236, 237, wherein this Court said:

> "The fact that the compensation law of the state was elective in form does not aid the respondents. The employer did not surrender rights guaranteed to him by the federal law merely by electing to accept one of two kinds of liability in respect of matters within the State's control, either of which she had power to impose upon him."

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*Sec. 9. "Every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of section two of this act, and unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of section two of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section two of this act and have agreed to be bound thereby. * * *"

The very bringing of the limitation proceeding and the issuance of injunctions therein restraining enforcement of any rights under the New Jersey Workmen's Compensation Act, demonstrate fully that respondent did not forego and release its maritime rights and remedies, but has enforced them to the full in going to decree adjudicating the merits of its right to have its liability limited. On this aspect of the case it is immaterial that the decree denied petitioner limitation of liability because of privity and knowledge of the negligence causing the disaster. Had the decree been the other way it is plain indeed that respondent would have fully enforced its admiralty rights and completely defeated any alleged compensation rights of petitioners on the ground that the State Compensation Statute was in conflict with Limited Liability Acts and the maritime law. As respondent did not forego and release its maritime rights and remedies, and was not restrained therefrom by force of the compensation statute, neither were petitioners.

Employers Liability Assn. Co. v. *Cobk,* 281 U. S. 233, at 236 to 237;
Fitzgerald v. *Harbor Lighterage Co.,* 244 N. Y. 132.

From the fact that the Compensation Act is not capable of administration in admiralty, the courts below have drawn the conclusion that employes should be excluded from the benefits of the limitation proceeding after sustaining all its burdens. Their conclusion should rather have been that admiralty would apply its own remedy of damages (under the general maritime law as supplemented by the Death Statute of New York State, which has jurisdiction over the waters involved under the compact between New York and New Jersey) so as to render the limitation proceeding completely

efficacious for the determination of all questions arising out of the disaster.

It is the beneficent object of the law to bring all parties into concourse who have claims arising out of the disaster and thus to prevent a multiplicity of actions.

Butler v. *Boston Steamship Co.*, 130 U. S. 527, 552;
Dowdell v. *U. S. District Court*, 139 Fed. 444, 445 (9th C. C. A.);
In re Pacific Mail Steamship Co., 130 Fed. 76, 83 (9th C. C. A.);
Oregon R. R. & Nav. Co. v. *Balfour*, 90 Fed. 295, 298 (9th C. C. A.).

POINT III.

By instituting the limitation proceeding, respondent waived, repudiated and lost by laches the right, if any such right existed, to confine petitioners to the compensation remedy, and is estopped from denying petitioners the right to recover in the forum to which it compelled them to resort.

If respondent had any rights inconsistent with the provisions of the maritime law, it lost such rights upon filing the petition for limitation of liability and may not press their enforcement now.

The Germanic, 196 U. S. 589;
Knott v. *Botany Mills*, 179 U. S. 69;
The Kensington, 183 U. S. 263.

The Compensation Act provides for arbitrary schedules of liability based upon principles different from those of the maritime law; if the schedules may not be applied, the stat-

ute has no efficacy and the schedules may only be applied by the forum established by the statute. If the schedules are enforced, limitation of liability as known in admiralty is defeated.

An admiralty court, it is submitted, can not consistently hold, first, that the limited liability acts of admiralty are applicable to a given cause, thus denying the remedy of the compensation acts at that stage, and then, upon determining on the merits that the respondent is not entitled to limitation of liability as prayed, nevertheless reestablish an effective jurisdiction in the compensation bureau or forum. Respondent having invoked the limited liability acts to the exclusion and nullification of the workmen's compensation act, must take the burdens of a possible liability to a decree in personam based upon the maritime law of liability for tortious wrongs, at the same time that it takes the benefits of a nullification of the workmen's compensation act and possible exemption from liability of any sort.

RESPONDENT REPUDIATED WORKMEN'S COMPENSATION.

We have stated in Point II that the so-called quasi-contractual obligation which the New Jersey Workmen's Compensation Act attempted to impose upon the parties could not prevent the full operation of the maritime law. But even if we assume that the alleged contract was at any time effective, such contract was definitely repudiated by respondent.

Respondent unequivocally took the position that it should pay claimants only $1,500, the alleged value of the "Linseed King," for all of the death claims, including those under the New Jersey Workmen's Compensation Act (R., 8). It in effect said that there was no obligation on its part to pay in

full the amount that might be due under the compensation act. It is too plain for argument that when a party is indebted to another in the sum of $300,000, but declares that he need pay only $1,500 in complete discharge of his obligation, such a declaration constitutes a repudiation of the obligation. *Oscar Barnett Foundry Co.* v. *Crowes,* 219 Fed. 450.

Not only did respondent deny its obligation to pay full workmen's compensation, it restrained petitioners from any effort to recover before the Workmen's Compensation Bureau (R., 27).

Indeed, Judge Patterson in his opinion stated that respondent (petitioner below) breached its contract to pay compensation, saying:

> "There is no gainsaying the fact that the conduct of the petitioner has been in violation of its contractual duty under the New Jersey Compensation plan. It asked for and obtained an injunction, which while permitting the filing of compensation claims in New Jersey, obstructed any further progress along that line for a considerable time" (R., 192)

but he concluded that the only remedy for this breach of contract: "is to hold it for interest upon delayed payments of compensation" (R., 193). This however was not the only remedy. Where a party breaches or repudiates his contract the injured party may treat such contract as rescinded. *United Press Asso.* v. *National Newspaper Asso.,* 237 Fed. 547, C. C. A. 8th Circuit. Upon respondent's breach of the alleged contract, therefore, petitioners were remitted to their position before such "contract" was made, i. e., to the right to sue for injury or death occurring within the territorial waters of New York.

The decision of both courts is in derogation of the principles of equity which should govern in a limitation proceeding. *Hartford Accident Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207.

Your petitioners were first precluded from proceeding with the determination of their claims before the Workmen's Compensation Bureau (R., 22-31). As claimants in the limitation proceeding, they were compelled to litigate issues of negligence and privity wholly foreign to a workmen's compensation remedy. They were thereby compelled to incur obligations for professional services, wholly unnecessary before the Workmen's Compensation Bureau, and to pay for large stenographic charges during a three weeks' trial and a two years' reference on damages. The costs and disbursements of this limitation proceeding to petitioners exclusive of attorneys' fees is already in excess of $10,000. After more than four years of litigation, the effect of disclaiming jurisdiction over your petitioners' claims is to deny them justice altogether. Not only are they denied a remedy in the forum which the respondent compelled them to enter by its election, not theirs, but they cannot be replaced in their original situation before the restraining order issued. The whole theory of workmen's compensation is a swift and summary adjudication, without litigation or formality. The whole effectiveness of that remedy, if in form allowed to these claimants, has in substance been destroyed. The restraining order forever deprived them of a swift and summary remedy, for it is only after an interval of nearly five years that they are allowed to proceed before that tribunal. The cheapness of that remedy has been nullified by the great

expense attached to the limitation proceeding. By the action not only of respondent but of the court they were first compelled to litigate and are now declared outside the jurisdiction originally asserted against them. Every determination of fact reached by the commissioner, at such cost of time and expense, in respect to these claims, is left open for redetermination by the Workmen's Compensation Bureau. It is a mockery to say that this is a restoration of the remedy originally open to these claimants before the Workmen's Compensation Bureau if the limitation proceeding and the restraining order (continued by the interlocutory decree) had not intervened.

The Circuit Court of Appeals asserts in its opinion that on the first day of the trial the company's advocate declared that it stood ready to pay workmen's compensation to all its employees. This conclusion is not correct. Respondent's suggestion of settlement was conditioned upon *all* claimants (employees and non-employees) compromising their claims on the basis of Workmen's Compensation (R., 289). Moreover, that statement was not made until the respondent had put the petitioners to the burden of securing counsel and preparing for trial so that the prejudice they sustained was not by way of delay merely but by way of expenditure. And further, such an informal offer was entirely nugatory under Rule 23 of the Admiralty Rules of the Southern District of New York governing the subject of tender and notices before trial in limitation of damage:

> "A tender inter partes before suit shall be of no avail in defense, or in discharge of costs, unless before answer filed, the amount so tendered shall be deposited in court to abide the final order or decree. In case of such deposit, the respondent or claimant shall recover costs, un-

less the libellant shall recover a sum in excess of the amount of the tender.

The libellant may at any time on notice take an order for the withdrawal of so much of the tender or amount deposited as the Court may allow, without prejudice to continuing the litigation for a larger amount, leaving in the registry a sum sufficient to cover the respondent's or claimant's costs, in case the amount deposited should be held in this court or in any Appellate Court, to be a sufficient tender.

If the respondent or claimant serves on the proctor of the libellant written notice of consent that the whole, or any specific part, of the tender deposited be paid to the libellant, the respondent or claimant shall not be liable thereafter for interest on so much of the libellant's claim.

At any time before trial a respondent or claimant may serve and file a written offer to allow a decree to be entered for a sum therein specified, with costs to the date of the offer. The respondent or claimant shall recover costs from the date of filing the offer unless the libellant shall recover damages in excess of the amount of the offer.

Nothing, however, in this rule shall be held to control the discretion of the Court in respect of costs and disbursements."

A further suggestion of the Circuit Court of Appeals that the claimants had themselves repudiated compensation awards and demanded damages, ignores the fact that only a minority had brought suit; that such as brought suit neither compelled the respondent to institute a limitation proceeding nor disabled it from doing so; that the effect of the Compensation Act was pleadable in such suits but the effect of the limitation proceedings and the restraining order therein was to enjoin any remedy under the Workmen's Compensation Act.

Having first repudiated the jurisdiction of the Workmen's Compensation Bureau and the remedies available before it, the respondent now seeks to repudiate the admiralty jurisdiction and the effect of its own limitation proceeding. Such an impairment of the admiralty jurisdiction and the violation of every equitable principle which should guide that jurisdiction, ought not to be sanctioned by this court.

It is respectfully submitted that the petition should be granted.

LUCIEN V. AXTELL,
Proctor for Petitioners.

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